No. 85-5915

In The

# Supreme Court of the United States

October Term, 1985

BRENDA E. WRIGHT, GERALDINE H. BROUGHMAN, and SYLVIA P. CARTER, individually and on behalf of all persons similarly situated,

*Petitioners,*

v.

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

## BRIEF FOR THE RESPONDENT

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## QUESTIONS PRESENTED

1. Does the phrase "and laws" as used in 42 U.S.C. § 1983 provide public housing tenants a federal cause of action to challenge their local landlord's implementation of complex interim utility regulations promulgated by the U. S. Department of Housing and Urban Development?
2. Do federal courts have jurisdiction of a lease dispute between public housing tenants and their local housing authority?
3. Are damage awards an appropriate remedy in private tenant suits seeking remedies for technical violations of utility subsidy regulations which are a part of a federal grant program allocating limited federal resources to the development of adequate low income housing?

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## BRIEF FOR THE RESPONDENT

## STATEMENT OF THE CASE

Petitioners are class representatives of approximately 1,100 tenants of public low-cost housing projects located in the City of Roanoke, Virginia. Respondent, the City of Roanoke Redevelopment and Housing Authority ("RRHA"), is a local public housing authority ("PHA") that manages and operates lower-income housing projects

pursuant to an Annual Contributions Contract ("ACC") with the Department of Housing and Urban Development ("HUD"). The ACC is mandated by the United States Housing Act of 1937, 42 U.S.C. §§ 1437-1437j (1985) ("the Act"), and requires PHAs receiving federal funds to abide by the Act and regulatory requirements established by HUD. ACC §§ 5, 7 (in record (R.) at Docket No. 30).

The Housing Act announces the policy of Congress to assist the states in remedying unsafe and unsanitary housing conditions and to alleviate the acute shortage of decent, safe, and sanitary dwellings for low-income families. 42 U.S.C. § 1437 (1985). To encourage and assist the states, the Act creates a federal subsidy program under which government funds are provided to states for the development and operation of public housing projects. 42 U.S.C. § 1437c (1985).

PHAs derive funds to operate their low-income projects from three sources: (1) rent collected from tenants, (2) fees collected from tenants for services other than rent, and (3) the federal subsidy. The rent a PHA may charge its low-income tenants is currently limited to 30% of the family's monthly adjusted income.[1] 42 U.S.C. § 1437a (1985).

In addition to rental charges, PHAs collect funds directly from tenants for damage costs and loss of items furnished by the PHA, management costs arising at termination of the lease (*e.g.*, cleaning stove, refrigerator, floors, removing trash), and maintenance costs incurred by the PHA because of the tenants' failure to maintain their yards, shovel snow, or provide proper trash containers for their individual units. *See* 24 C.F.R. § 966.4(b) (2) (1985) (incorporated in RRHA Lease, ¶ 8 (R. 5, exh. H)). In the same fashion, PHAs collect from tenants the cost of excess use of utilities, *i.e.*, usage over the amount allowed and provided to the tenants at no cost. 24 C.F.R. §§ 965.477, 966.4(b) (2) (1985).

[1]At the operative date of this suit, the Housing Act required that rent charged by PHAs "shall not exceed 25 percentum of family income in the case of a very low income family." 42 U.S.C. § 1437a(1) (1980). (Petitioners' SA 1-2.) The percentage ceiling for families of lower income was increased to 30% effective October 1, 1981. 42 U.S.C. § 1437a(a) (1985).



HUD annual contributions subsidize PHAs for needed operating and other expenses that they are unable to collect from tenants as rent or as other HUD-allowed cost recovery. 42 U.S.C. § 1437c(a) (1985). *See also* ACC §§ 7, 407 (R. 30). Recovery of excess utility cost is at issue in this case.

As a part of its overall subsidy scheme, HUD has, from time to time, issued regulations governing the establishment of utility allowances, *e.g.*, 24 C.F.R. §§ 865.470-.482 (1980), which provide free electricity or other utilities to tenants of PHAs. PHAs are required by HUD regulations to provide a reasonable amount of utilities to their tenants and are permitted by those same regulations to surcharge tenants for utility consumption above the allowed amounts. *See, e.g.*, 24 C.F.R. §§ 865.470, 865.473 (1980), superceded by 24 C.F.R. §§ 965.470, 965.473 (1985).

Interim utility regulations issued by HUD in 1980, 24 C.F.R. §§ 865.470-.482 (1980), are the source of this case.[2] The general scheme of these regulations provides

[2]Unless otherwise noted, all citations made hereinafter to the HUD utility regulations are to the interim regulations at 24 C.F.R. §§ 865.470-.482 (1980), which are at issue in this suit.

that a PHA should calculate its allowance of a "reasonable amount of electricity" as follows:

(1) The consumption data for all units of a dwelling unit category is listed in order from low to high consumption for each billing period. 24 C.F.R. § 865.477(a) (1980).

(2) Unusually high instances of consumption which may be due to unusual individual circumstances, wasteful practices, or use of tenant-supplied major appliances should be excluded from consideration in calculating the amount of the allowance. 24 C.F.R. § 865.477(b) (1980).

(3) Averages should then be computed from the data and adjustments made for abnormal weather conditions "or other changes in circumstances affecting utility consumption." 24 C.F.R. § 865.477(c) (1980).

(4) The utility allowances "should . . . be established at the level which can reasonably be expected to meet the requirements of 90% of the dwelling units in the category." 24 C.F.R. § 865.477(d) (1980).

Surcharges for consumption in excess of the allowances are to be imposed on "about 10%" of dwelling units. 24 C.F.R. § 865.477 (1980). *See also* 24 C.F.R. § 865.479 (1980). Surcharge of more than 10% of dwelling units, however, is also contemplated under the regulations. The regulations provide that at the end of each billing period, PHAs must review the number and percentage of tenants who are surcharged. If "more than 25%" of dwelling units in a category are surcharged, the regulations require the PHA to revise its allowances "if appropriate." 24 C.F.R. § 865.480(b) (1980).

Calculation of future utility allowances pursuant to the interim rule was in large part based on past tenant consumption. 24 C.F.R. § 865.476 (1980). The past consumption standard provided tenants no incentive toward energy conservation. The more utilities tenants consumed, the higher their future utility allowances. *See* 47 Fed. Reg. 35249, 35250-51 (1982). Within months of their implementation, the interim regulations were targeted for review by the Presidential Task Force on Regulatory Relief, which concluded that the interim regulations encouraged waste by tenants, increased costs to the government and PHAs and penalized tenants who tried to conserve energy. Exec. Order No. 12291 (1981), *cited in* 47 Fed. Reg. at 35250 (1982).



On December 8, 1982, petitioners filed a class action suit for injunctive relief and damages in the United States District Court for the Western District of Virginia against RRHA, contending that petitioners' PHA-provided allowances for free electricity (and surcharges for excess usage) were not being furnished in accordance with the Housing Act and interim HUD regulations. (J.A. 3). Petitioners sought recovery of all surcharges collected for excess electricity use and an injunction requiring RRHA to recalculate the electrical allowances. (J.A. 10). Petitioners' action was based on 42 U.S.C. § 1983, seeking redress for deprivation of "rights, privileges or immunities secured by the Constitution and laws" claimed to arise from RRHA's alleged failure to properly or fully implement the applicable HUD interim regulations governing the establishment of electrical utility allowances. (J.A. 9).[3]

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[3]Petitioners' claim under § 1983 is based solely on the "and laws" language of § 1983. It is well-established that tenants have no right to adequate housing arising under the Constitution. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972). Petitioners do *not* allege any violation of their due process or equal protection rights under the 5th and 14th Amendments.

Petitioners did not sue HUD. RRHA filed a motion for judgment on the pleadings on the grounds that petitioners failed to state a cause of action under the Housing Act and 42 U.S.C. § 1983 and failed to join HUD as a necessary party.[4] (J.A. 16-17). RRHA answered petitioners' interrogatories (R. 5) and filed the ACC by affidavit. (R. 30). Petitioners filed a motion for summary judgment to be simultaneously considered with RRHA's motion. (J.A. 18).

On December 21, 1984, the district court, treating RRHA's motion for judgment on the pleadings as one for summary judgment, dismissed petitioners' case, concluding that petitioners have no right of action under 42 U.S.C. § 1983.[5] (J.A. 19-29). The district court did not reach the question of whether HUD is a necessary party to the suit. Petitioners appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit, challenging the district court's holding that petitioners have no § 1983 remedy.[6] (R. 32).

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[4]Indeed, despite RRHA's assertion that HUD is an indispensable party in this suit (J.A. 16-17) and petitioners' repeated allegation that HUD has failed to effectively enforce its contract with RRHA (Brief of Petitioners, p. 39), petitioners have consistently refused to join HUD as a party to this suit.

[5]The district court also found that petitioners have no implied right of action under the Housing Act. (J.A. 3). Petitioners do not contend that such implied right of action exists and thus do not challenge this aspect of the district court's decision. (Brief of Petitioners, p. 8.)

[6]Petitioners also asserted a right of action grounded in RRHA's alleged violation of the standard lease agreement between tenants and RRHA, which the circuit and district courts properly dismissed as a pendent claim pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Such lease creates a landlord-tenant relationship governed by state law. *See infra* pp. 38-42.



Peitioners' claim for injunctive relief was mooted by HUD's adoption of a final rule in 1984 and RRHA's revision, effective January 1985, of its utility allowances pursuant to the new utility regulations. Petitioners' Statement of Proceedings (R. 33). Accordingly, petitioners' sole claim in this case is one for damages measured by the amount of the surcharges they contend were improperly collected for electrical consumption in excess of the free electricity provided by allowance in the years 1981-1984. (Brief of Petitioners, p. 8.)

The circuit court, applying the tests set out in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), and *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), concluded that no § 1983 action was available to petitioners and that HUD alone is the appropriate party to enforce the provisions of the Act and agency utility regulations against the local PHA. (J.A. 30-44).

RRHA's compliance with the regulations, the amount of electricity provided, and the propriety of any surcharges are not at issue in this appeal. The principal issue before this Court is whether the phrase "and laws" as used in 42 U.S.C. § 1983 allows petitioners a federal forum in which to challenge the implementation and application of these HUD utility regulations by a local PHA. A secondary issue is whether the tenant lease creates a basis for federal question jurisdiction.

## SUMMARY OF ARGUMENT

The United States Housing Act of 1937 and the federal funding scheme created pursuant thereto by Congress establish the basic framework of the national housing program. The Department of Housing and Urban Development is delegated regulatory authority under this scheme. Among its many regulations, HUD has promulgated utility allowance regulations requiring public housing authorities to provide reasonable amounts of free utilities to their low-income tenants. Neither the HUD regulatory scheme nor the Housing Act vests in public housing tenants substantive rights to free utilities sufficient to trigger a cause of action under 42 U.S.C. § 1983.

The Brooke Amendment, 42 U.S.C. § 1437a(a) (1985), limits the amount of rent a PHA may charge its public housing tenants. Congress did not include utilities as a component of the rent limitation set out in the Brooke Amendment. In other unrelated portions of the Housing Act, however, Congress did include the cost of utilities in the definition of "rent." *See* 42 U.S.C. § 1437f (1985). Common rules of statutory construction and the plain meaning of the Brooke Amendment establish that Congress imposed no specific limitation on the amount of electricity a PHA could or should provide its tenants and likewise imposed no specific limitation on the amount of electricity public housing tenants could use at their own expense. Petitioners' claimed right to free electricity thus does not arise under federal statutory "law" within the meaning of 42 U.S.C. § 1983.

The utility allowance scheme on which petitioners rely, 24 C.F.R. §§ 865.470-.482 (1980), is purely a regulatory



creation of HUD. Section 1983 heretofore has been recognized only as a remedy for state violations of federal statutory rights, not violations of regulatory rights. *Maine v. Thiboutot*, 448 U.S. 1 (1980).

In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), this Court established that where the statutory "rights" of which enforcement is sought under § 1983 are nonspecific, a § 1983 cause of action is not available. The regulatory scheme at issue in this case does not create in petitioners any right to free electricity sufficiently specific to be enforced under § 1983. HUD's interim utility allowance regulations establish guidelines that PHAs must follow in calculating "reasonable" utility allowances. 24 C.F.R. §§ 865.470-.482 (1980), superceded by 24 C.F.R. §§ 965.470-.480 (1985). PHA utility calculations under the interim regulations require highly technical computations and the broad use of PHA discretion in balancing an almost endless array of subjective criteria. Such broad discretion is vital to the fair allocation of utility allowances.

HUD retains discretion in administering and enforcing the utility program. This discretion is particularly critical in the instant case, given HUD's awareness of the serious deficiencies and ambiguities inherent in the interim regulations.

Calculation of PHA utility schedules and imposition of individual utility surcharges by federal courts in § 1983 tenant actions would severely undermine HUD's administrative and enforcement authority. Carefully defined policy goals and resource allocations would be disrupted by such judicial intrusion into the regulatory process.

In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), this Court established that no § 1983 cause of action is available where the framework of the statute in question evinces Congress' intent to preclude a § 1983 remedy. A review of congressional purpose in implementing the federal funding framework of which the HUD utility regulations are a part, discloses congressional intent to foreclose private § 1983 enforcement of the interim regulations.

HUD retains broad discretion in enforcing PHA compliance with its regulations under the elaborate HUD subsidy scheme. HUD establishes the guidelines under which PHAs must calculate their utility allowances, periodically audits PHA calculations, and retains the power to approve the PHA allowances prior to their implementation. HUD also maintains financial control over PHAs through the funding provisions of the ACC.

In determining whether Congress intended to foreclose a § 1983 action under a federal grant program created by legislation that predates this Court's decision in *Thiboutot*, the factors set out in *Cort v. Ash*, 422 U.S. 66 (1975), logically must be considered in defining congressional purpose. The need to look beyond the express congressional articulation of intent is particularly vital where, as here, petitioners' alleged rights are grounded in agency regulations. The local nature of petitioners' state landlord-tenant claim, the congressional goal of encouraging state involvement in the federal housing program, and the Housing Act's express purpose "to assist the States" are evidence that Congress intended to preclude a § 1983 remedy under the public housing subsidy program.

RRHA has met the requirements of the tests enunciated by this Court in *Pennhurst* and *Sea Clammers* to es-



tablish that petitioners have no § 1983 action in this case. Even if this Court believes that petitioners are possessed of a § 1983 claim, the sole remedy that petitioners seek, compensatory damages, is inappropriate in a private action to redress violations of a federal grant program like that created by the Housing Act and HUD regulations. *See Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983) (White, J., plurality).

Finally, petitioners' lease with RRHA creates a local landlord-tenant relationship, the dynamics of which necessarily and properly are governed by state law. The mere fact that the terms of RRHA's standard lease are defined by HUD regulation does not elevate petitioners' state lease claim to a federal question. To hold otherwise would make every broken window or plumbing failure grounds for a federal cause of action. The district and circuit courts below properly dismissed this pendent state claim in the reasonable exercise of their discretion. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

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## ARGUMENT

### I. Public Housing Tenants Have No Federal Cause Of Action Under 42 U.S.C. § 1983 To Redress Individual Grievances Arising Out Of Their Local Landlord's Implementation Of Technical Interim Utility Regulations Promulgated By The Department Of Housing And Urban Development.

The trilogy of *Maine v. Thiboutot*, 448 U.S. 1 (1980), *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), and *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), provides the framework for resolution of this case. In *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court concluded that

the plain meaning of the phrase "and laws" in 42 U.S.C. § 1983 creates a private cause of action to redress not only state violations of civil rights and equal protection statutes, but also state violations of all federal statutes.[7] 448 U.S. at 4. This Court's subsequent decisions, however, recognize that unlimited judicial applications of the "and laws" language of § 1983 is impractical and inappropriate. An unqualified interpretation of *Thiboutot* not only would place an impossible burden on state officials attempting to comply with the myriad of federal directives, but also would seriously undermine agency authority to promulgate regulations and enforce policy objectives.

This Court swiftly noted exceptions to *Thiboutot* in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), and *Middlesex County Sewerage Authority*

[7]In *Thiboutot*, the Court concluded that § 1983 embraced respondents' claim that the state had violated the Federal Social Security Act. The Court's holding extended the § 1983 remedy to "violations of federal *statutory* law as well as constitutional law" by state actors. 448 U.S. at 4. *Thiboutot* does not suggest the extension of § 1983 to federal regulatory enactments. Indeed, the oft-expressed "rule" relied upon by petitioners that a properly promulgated final rule may have "the *force* and *effect* of law," *see Chrysler Corp. v. Brown*, 441 U.S. 281, 301-303 (1979), is a tacit admission that agency regulations are not themselves laws in the statutory sense. (Brief of Petitioners, p. 26.)

This Court has noted on numerous occasions that the framers of § 1983 intended that statute to provide a federal cause of action to prevent state actors from violating federal *statutory* rights where the states were unwilling or unable to take action to remedy the violations. *District of Columbia v. Carter*, 409 U.S. 418, 426-29 (1973); *Monroe v. Pape*, 365 U.S. 167, 174-83 (1961), *rev'd on other grounds, Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). Clearly, however, such concerns are not present in the context of modern federal grant programs, where the grantor agency is itself a federal entity, one of the primary functions of which is to oversee the operation of the local grantee. Brown, *Whither Thiboutot? Section 1983, Private Enforcement, and the Damages Dilemma*, 33 DEPAUL L. REV. 31, 64 (1983).



*v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981).[8] These two decisions make clear that claimants cannot bring suit in federal court every time there is an alleged violation of federal law by a state actor. A § 1983 remedy is unavailable where it is shown (1) that the "law" allegedly violated fails to create substantive rights sufficient to trigger a § 1983 action, *Pennhurst*, 451 U.S. at 28, *or* (2) where Congress intended to preclude a § 1983 remedy by expressly or impliedly foreclosing private enforcement of the statute. *Sea Clammers*, 453 U.S. at 19-20.

### A. Public Housing Tenants Do Not Have Rights To Specific Amounts Of Free Electricity Under HUD Utility Regulations Sufficient To Trigger A Cause Of Action Under 42 U.S.C. § 1983.

In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), this Court established that a cause of action under 42 U.S.C. § 1983 is unavailable where a claimant attempts to enforce nonspecific or ambiguous "rights." 451 U.S. at 18. Under HUD's interim utility regulations, petitioners are not entitled to specific amounts of free utilities. Rather, PHAs are to provide "reasonable" amounts of utilities to tenants. Thus, petitioners have no "rights" sufficient to satisfy the *Pennhurst* test. PHAs must balance ambiguous criteria and exercise broad discretion in calculating tenant utility allowances under the interim regulations. HUD's concommitant exercise of discretion in enforcing the regulations is critical to the equitable and efficient operation of the utility subsidy system.

This Court in *Pennhurst* found that disabled citizens have no enforceable § 1983 rights to "appropriate treat-

[8]This Court has most recently restricted the broad reach of 42 U.S.C. § 1983 in another context in *Daniels v. Williams*, — U.S. —, 106 S. Ct. 662 (1986) (mere negligence of state official will not support constitutional claim for relief under § 1983).

ment" in the "least restrictive environment" under 42 U.S.C. § 6010, the Developmentally Disabled Assistance and Bill of Rights Act.[9] 451 U.S. at 18. In reaching its conclusion, the Court recognized that meaningful state participation in consensual social welfare projects would be inhibited if beneficiaries of typical federal grant programs were vested with enforceable rights under those programs. 451 U.S. at 18, 24-25.

Imposing potential § 1983 liability on PHAs that fail to provide "reasonable utilities" to public housing tenants would have the same negative consequences on the public housing program as awarding "appropriate treatment" to disabled citizens would have had on the federal funding program at issue in *Pennhurst*. The utility subsidy program is a consensual federal-state grant program, the effective administration of which depends on HUD's broad exercise of discretion. Under the interim regulations, HUD provides federal assistance to PHAs that agree to provide low-income tenants with "reasonable" amounts of free utilities. 24 C.F.R. §§ 865.470-.482 (1980). In administering the program, HUD retains the discretion not only to establish and revise the guidelines under which the utility allowances are to be calculated, but also the responsibility to audit, evaluate and determine whether PHA-calculated utility allowances are in compliance with HUD

[9] 42 U.S.C. § 6010 (1976) in pertinent part provides:

> Congress makes the following findings respecting the rights of persons with developmental disabilities:
>
> (1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.
>
> (2) The treatment, services, and habilitation for developmental disabilities . . . should be provided in the setting that is least restrictive of the person's personal liberty. . . .



directives. *See* 24 C.F.R. § 865.473(a) (1980). *See also* ACC §§ 311 (audits), 507-508 (governmental remedies in event of breach) (R. 30). HUD also exercises its discretion in approving PHA allowances before they become effective. 24 C.F.R. § 865.473(a) (1980).

HUD's policymaking and enforcement authority would be severely undermined if the regulatory process could be circumvented by individual tenants claiming § 1983 rights against local PHAs under utility subsidy regulations. HUD's administrative efforts and adjustments would be subject to constant interruption and challenge as the courts interpreted and enforced regulations and guidelines in the agency's area of expertise and responsibility. Judicial damage awards under § 1983 would result in a reallocation of limited HUD funds and would disrupt the delicate financial priorities established by HUD pursuant to its program goals. The formulation of a coherent national housing policy would be rendered almost impossible as courts could, and most probably would, vary on such fundamental regulatory issues as what are "abnormal weather conditions," what are "wasteful" tenant activities, and what are "major" or "unusual" tenant-owned appliances. *See* 24 C.F.R. § 865.477 (1980).

Efforts to define the inexact standard of "reasonable utilities" are the essence of the utility regulations upon which this suit is based. HUD has defined the "contract rent" to be paid by public housing tenants to include "rent" plus "reasonable amounts of utilities." *E.g.*, 24 C.F.R. § 860.403(a)(1982). Petitioners portray this standard as a mere mechanical calculation that federal courts can utilize to redress claims for specific sums of free utilities. (Brief of Petitioners, pp. 25-26.) A realistic ap-

praisal of the regulations, however, leaves little doubt that calculation of utility allowances cannot be reduced to a mechanical formula. Rather, such computations under the interim utility regulations require significant PHA discretion and HUD supervision. 24 C.F.R. § 865.477(b) (1980) provides that a PHA should not consider "any unusually high instances of consumption which might be due to unusual individual circumstances, wasteful practices, or use of . . . tenant-supplied major appliances" in calculating allowances.[10] A federal court imposing *specific* utility allowances on a PHA under the regulations would thus be forced to exercise discretion as to which excess consumption elements should be excluded from the calculation and impose its own policy judgment as to which utility uses constitute "wasteful" or "excessive" practices.

Even greater discretion is necessary in the imposition of tenant surcharges. The utility regulations provide that PHAs should calculate utility allowances "at the level which can reasonably be expected to meet the requirements of 90% of the dwelling units in the category." 24 C.F.R. § 865.477(d)(1980). Surcharges for excess consumption are to be imposed on "about 10%" of dwelling units. 24 C.F.R. § 865.477 (1980). A close examination of the regu-

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[10]Because of the stop-gap nature of the interim regulations in this case, the regulations provided little guidance concerning the distinction between tenant use of "major appliances" or "luxury items" (as defined at 49 Fed. Reg. 31399, 31404 (1984)) and "reasonable" utility uses. In formulating the final rule, however, HUD discussed in detail the difficult discretionary decisions involved in balancing consumption factors in calculating utility allowances:

> Should indoor temperature levels be set at 68° F. or 70° F.? Should air-conditioning be included? Should elderly households be treated differently than non-elderly? Should washers and dryers be included? HUD believes these decisions are within the competence of PHAs to establish.

49 Fed. Reg. at 31404.



lations, however, makes clear that surcharge of more than 10% of dwelling units is contemplated by HUD. Under 24 C.F.R. § 865.480(b)(1980), a PHA is not required to revise its allowances until "*more than 25%*" of the tenants in a dwelling unit category are being surcharged. Even at the 25% mark, such revision is required only "if appropriate." 24 C.F.R. § 865.480(b) (1980).

As the foregoing makes clear, the utility regulations do not provide tenants with § 1983 rights to specific sums of free utilities. "Reasonable utilities" is not susceptible to objective mechanical calculation under the regulatory framework. HUD and PHA discretion is critical in balancing a long list of imprecise criteria which may affect calculation of allowances and assessment of surcharges in any billing period. Moreover, there are fundamental ambiguities in the calculation formula itself—ambiguities properly left to an administrative agency with national oversight of a national program.

If petitioners in this case are vested with § 1983 rights, federal courts will be required to undertake technical and highly discretionary reviews of individual tenant energy consumption, comparing individual use with uses of other tenants in similar dwellings and taking into account weather conditions, unit size and past consumption history, in order to determine which tenants were properly surcharged and the amount of the actual surcharge. Review of the case at bar would necessitate examination of the personal consumption habits of 1,100 households. (J.A. 5). Given these considerations, it is "highly unlikely that Congress intended federal courts to make the necessary computations regarding utility allowances that would be required to adjudicate individual claims of right." *Wright v. City of Roanoke Redevelopment and Housing Authority*, 771 F.2d

833, 836-37 (4th Cir. 1985). *See also Brown v. Housing Authority of McRae,* No. 85-8186 (11th Cir. Mar. 25, 1986) (*case lodged with the Clerk for the convenience of the Court).[11]

[11]Petitioners suggest that the weight of authority supports the proposition that public housing tenants have § 1983 rights to specific utility allowances. (Brief of Petitioners, p. 15 n.12.) However, all of the utility allowance cases on which petitioners rely for the proposition that § 1983 rights attach to HUD's interim utility allowance regulations have their genesis in the district courts of the Fourth and Eleventh Circuits. The rationale behind these decisions was rejected in *Wright v. City of Roanoke Redevelopment and Housing Authority,* 771 F.2d 833 (4th Cir. 1985) (J.A. 30), and *Brown v. Housing Authority of McRae,* No. 85-8186 (11th Cir. Mar. 25, 1986) (*lodged with the Clerk). In *Stone v. District of Columbia,* 572 F. Supp. 976 (D.D.C. 1983), the district court also held that no § 1983 rights accrued to tenants under the interim utility regulations. The district court's decision was appealed by tenants, and the suit was settled by subsequent HUD action prior to a circuit court decision. On April 2, 1986, HUD filed a motion for affirmance of the district court decision.

A holding that § 1983 rights do not attach to tenants under HUD's interim utility regulations does not mean that tenants have no substantive rights under other sections of the Housing Act. As this Court made clear in *Pennhurst,* 451 U.S. at 23, certain sections of an act or program may give rise to rights while other sections do not. Thus petitioners' reliance upon cases involving violations of clear congressional mandates under the Housing Act, as opposed to the discretionary and ambiguous interim utility regulations involved here, is inappropriate. *See generally Samuels v. District of Columbia,* 770 F.2d 184, 198-99 n.12 (D.C. Cir. 1985) (distinguishing nondiscretionary congressional mandate to implement grievance mechanism, 42 U.S.C. § 1437d(k), with more vague congressional language in 42 U.S.C. § 1437 (policy statement) and 42 U.S.C. §§ 1437d(c)(4) and 1437d (c)(3)(ii) (tenant selection criteria)). *Compare Perry v. Housing Authority of the City of Charleston,* 664 F.2d 1210 (4th Cir. 1981) (no § 1983 rights created by policy language of 42 U.S.C. § 1437) and *Phelps v. Housing Authority of Woodruff,* 742 F.2d 816 (4th Cir. 1984) (no § 1983 rights to tenant selection process under 42 U.S.C. §§ 1437d(d)(ii), 1437d(c)(4)) with *Beckham v. New York City Housing Authority,* 755 F.2d 1074 (2d Cir. 1985) (section 1983 cause of action for violation of Brooke Amendment rent limits).



Judicial enforcement of individual tenant claims in this case is particularly inappropriate given the interim nature and controversial history of the utility regulations upon which petitioners rely.[12] Calculation of the utility allowances under the interim regulations is in large part based on past consumption records for each dwelling unit. 24 C.F.R. § 865.476(a) (1980). The inequality created by a mechanical application of the past consumption standard is evident: the more utilities a tenant consumes, the more free electricity the tenant would be entitled to receive in the future, and based on that increased consumption, the entitlement would be enlarged again (and again and again). *See* 47 Fed. Reg. 35249, 35251 (1982). Under this formula,

[12]HUD's utility allowance regulations historically have engendered significant comment from PHAs and tenant groups. 49 Fed. Reg. 31399, 31401 (1984). The original utility allowance rule proposed by HUD met with such fierce disapproval by both PHAs and tenants in the notice and comment process that HUD was forced to withdraw the plan. 45 Fed. Reg. 59502 (1980). In its place, HUD implemented 24 C.F.R. §§ 865.470-.482 (1980), the interim regulations upon which this suit is based. The interim rule became effective October 1, 1980, prior to notice and comment, although notice and comment is generally required for valid HUD rulemaking by 24 C.F.R. § 10.1 (1979). *See Brown v. Lynn,* 392 F. Supp. 559 (N.D. Ill. 1975) (rules promulgated in violation of 24 C.F.R. § 10.1 not binding).

As an acknowledgment that the interim rule was not finely-tuned and that revisions would be necessary, HUD requested comments from interested parties, but such comments were not due until after the effective date of the interim regulations. 45 Fed. Reg. 59502 (1980). HUD's explanation for instituting the program prior to notice and comment was the need to effectuate the plan before the onslaught of winter. 45 Fed. Reg. at 59505. However, PHAs were not required to comply with the interim rule until February 1981. 47 Fed. Reg. 35249, 35250 (1982). The comments received on the interim rule revealed serious defects in the plan, *see infra* pp. 20-21, verifying that the gap-filling regulations are inappropriate for literal interpretation. As HUD acknowledged, "provisions of the interim rule attracted even sharper criticism from PHAs than the proposed rule." 47 Fed. Reg. at 35251.

the greatest benefits accrue to abusers of the system. Tenants who routinely run air conditioners at all hours and frequently use "major tenant-supplied appliances" or "luxury" appliances (as defined at 49 Fed. Reg. 31404 (1984)) are entitled to more electricity than tenants who attempt to conserve energy.

HUD quickly became aware of the deficiencies inherent in the interim rule and shortly after its implementation proposed revisions. *See* 47 Fed. Reg. 35249 (1982). The Department's comments recognize not only that the interim regulations were wasteful, but also that they were inequitable to tenants who purchased their utility services directly from public utilities.[13] 49 Fed. Reg. at 35250-51. The utility consumption "allowed" to tenants who were provided utility services by the PHA was more generous than the amount "allowed" to tenants billed directly by the utility. Under the interim rule, allowances for tenant-purchased projects were established on the basis of the average actual cost of the utilities to the tenants. 24 C.F.R. § 865.478 (1980). Half of the tenants in tenant-purchased projects therefore were subject to surcharge for excess consumption. 49 Fed. Reg. at 31400. In projects in which the PHA provided services, like those in which petitioners reside, however, utility allowances were set at a level *above*

[13]The interim regulations established that utilities either may be "Tenant-Purchased" or "PHA-Furnished." In the case of Tenant-Purchased Utilities, the tenant pays the actual utility charge directly to the supplier, and the fixed Allowances are deducted from the Gross Rent otherwise chargeable to the tenant. PHA-Furnished Utilities are provided under a check-meter system whereby the PHA pays the utility supplier and surcharges tenants for consumption in their dwelling units in excess of the Allowance. *See* 24 C.F.R. § 865.470 (1980). Petitioners in this suit are residents of PHA-Furnished projects.



average consumption.[14] 24 C.F.R. § 865.477(d) (1980). *See generally* 49 Fed. Reg. at 31400.

The inadequacies of the interim regulations were swiftly noted in other quarters as well. On August 12, 1981, just months after its implementation, the interim rule was targeted for review by the Presidential Task Force on Regulatory Relief, chaired by Vice President Bush. Exec. Order No. 12291 (1981), *cited in* 47 Fed. Reg. at 35250. In its announcement, the Task Force stated:

> Under current rules, many tenants in public housing projects have no incentive to economize on utility use. Excessive utility use increases costs to both the Federal government and local public housing agencies (PHAs). As a result, PHAs may be forced to reduce other tenant services in order to cover costs. In effect, this system penalizes conservation-minded tenants and wastes energy.

47 Fed. Reg. at 35250.

The nonspecific nature of the utility allowances coupled with the interim regulations' peculiar history, make the regulations inappropriate for literal judicial enforcement. HUD exercises substantial discretion in approving, monitoring and enforcing PHA utility allowances. Such agency discretion was pivotal to the fair administration of the utility subsidy program under the interim rule, partic-

[14]The historic rationale for this difference in treatment was "to prevent surcharging too many tenants." 49 Fed. Reg. at 31400. HUD, however, quickly recognized that "the pragmatic objective of avoiding the surcharging of too many tenants by PHA's is outweighed by the inequality which results from requiring more generous allowances for tenants in PHA-furnished projects than allowances provided for direct-purchasing tenants." 47 Fed. Reg. at 35251. Indeed, the final regulations place no limit on the number of tenants that a PHA may surcharge for excess utility consumption. 24 C.F.R. §§ 965.476(a), 965.477(b) (1985).

ularly given HUD's awareness of the critical shortcomings of the regulations.

Broad agency discretion is vital to HUD's effective administration of the federal-state funding scheme of which the utility subsidy program is a part. Such discretion ensures HUD the flexibility to implement an ongoing review process and permits the agency to engage in a continuing dialogue with the states and tenants, issuing directives to them and listening to their comments and complaints with regard to the feasibility—or lack thereof—of department regulations. Communication between a promulgating agency and participants in developing programs is particularly important where, as in this case, agency efforts to fine-tune interim regulations are concerned. Where interim rules are at issue, there exists a danger that courts may enforce literally that which the agency intends to be part of the give-and-take of the rulemaking process. Petitioners should not be allowed to interpose their view as to the proper application of the interim regulations in lieu of the views of HUD and local PHAs.

### B. The Housing Act Confers On Petitioners No Right To Specific Amounts Of Free Electricity Cognizable Under 42 U.S.C. § 1983

As established in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), a § 1983 cause of action is not available if the federal statute allegedly violated fails to create in the claimant substantive, unambiguous rights. 451 U.S. at 28. In *Pennhurst*, the Court concluded that the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000 *et seq.*, created a federal-state funding scheme "to assist [the] States in improving the care and treatment available to the mentally retarded," 451 U.S. at 22, and noted that the case for private enforcement of statutes is at its weakest where private rights would impose affirmative funding obligations on the states. 451 U.S. at 16-17.



The Housing Act, like the Developmentally Disabled Bill of Rights Act, creates a federal grant program under which the federal government provides funds to states which agree to adhere to federally-defined guidelines and policy goals. The Act expressly declares:

> It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this Act, *to assist the several States and their political subdivisions* to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of lower income. . . .

42 U.S.C. § 1437 (1985) (emphasis added). This broad declaration of policy establishes that the primary purpose of the Housing Act is to provide direct financial incentives to the states and their local agencies in order to increase and improve the housing stock available to lower-income families. Lower-income tenants incidentally benefit from the federal assistance provided the states. Such incidental benefits, however, are insufficient to create in public housing tenants a § 1983 action to enforce HUD utility regulations against local PHAs.

In order to claim their "right" to free electricity, petitioners rely on the language of the Brooke Amendment, 42 U.S.C. § 1437a(a) (1985). The Brooke Amendment establishes the income levels that public housing tenants must meet in order to qualify for public housing and the percentage of that income that may be charged as rent to these tenants. The Brooke Amendment rent limits, however, do not provide for, nor even mention, utilities as a

component of the rent charged tenants of public housing authorities. Review of the Housing Act establishes that where Congress intended utilities and/or other charges to be considered in the calculation of tenant "rent," it expressly said so. The absence of any reference to "utilities" in the Brooke Amendment limits establishes that Congress had no intention to offer tenants the same protection against charges for direct operating costs as it offered them for rent.

The Housing Act creates two types of public low-income housing arrangements that HUD may subsidize. As in this case, HUD may enter into an ACC with the local PHA under which federal monies are provided to the PHA to assist the housing authority in the development and maintenance of low-income housing. 42 U.S.C. § 1437c (1985). *See also* 42 U.S.C. § 1437d (1985). The statutory provisions creating this subsidy limit rent collections, but make no mention of utility costs or charges.

HUD also may enter into ACCs with PHAs under which PHAs make assistance payments to owners of private dwelling units who will rent so-called "Section 8 housing" to low-income families. 42 U.S.C. § 1437f (1985). Unlike the PHA-assisted programs at issue in this case, Congress expressly provided that Section 8 "rent" includes utilities: "An assistance contract entered into pursuant to [Section 8] shall establish the maximum monthly rent (*including utilities and all maintenance and management charges*) which the owner is entitled to receive. . . ." 42 U.S.C. § 1437f(c) (1) (1985) (emphasis added). Similarly, in defining the maximum monthly rent payable to the owner of real property on which is located the manufactured home of a low-income family, Congress expressly defined "rent" to include fees for maintenance and manage-



ment: "A contract entered into pursuant to this paragraph [of Section 8] shall establish the maximum monthly rent (*including maintenance and management charges*) which the owner is entitled to receive. . . ." 42 U.S.C. § 1437f(j) (2) (A) (1985) (emphasis added).

Unlike the Section 8 provisions discussed above, the Brooke Amendment does not define "rent" beyond its plain meaning (*i.e.*, shelter cost or a fee for a possessory use of the land).[15] Under the principle of *inclusio unius est exclusio alterius*, Congress' express inclusion of utilities as "rent" in Section 8 of the Housing Act necessarily implies Congress' intent to exclude utilities from "rent" in those sections of the Act in which utilities are not so expressly included.

Nevertheless, petitioners assert that § 2 of the original Housing Act of 1937, ch. 896, § 2, 50 Stat. 888 (1937) (S.A. 5-6), is evidence that Congress intended the Brooke Amendment to limit utilities as well as rent. (Brief of Petitioners. pp. 23-24.) That now-amended provision, however, specifically included utilities in the concept of "rental" only for the limited purpose of calculating tenant income eligibility requirements, not for the purpose of determining the amount of rent PHAs could charge their low-income tenants. The original § 2 provided that in calculating a potential tenant's qualification for low-income housing "the value *or cost*" to the tenant of utilities must be considered *in addition to* the "rent" the tenant would be expected to pay. The plain language of § 2 contemplated that, after eligibility is established, utilities

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[15] BLACK'S LAW DICTIONARY 1166 (rev. 5th ed. 1979), defines "rent" simply as "[c]onsideration paid for use or occupation of property." Common usage thus does not recognize utilities as an inherent part of "rent."

could be a "cost" incurred by PHA tenants. In any event, Congress amended § 2 in 1959, expressly deleting the reference to "utilities" in the income eligibility requirement and in its place providing a more general reference to "other factors which might affect the rent-paying ability of the family. . . ." Housing Act of 1959, Pub. L. No. 86-372, § 503, 73 Stat. 654 (1959) (S.A. 6) (current version at 42 U.S.C. § 1437 (1985)).

Congress had a clear opportunity to incorporate a provision expressly including utilities in the rental limitation set out in the Brooke Amendment (as it did in Section 8 housing), but chose not to do so. The original Senate bill introducing the rent limitation (later to be known as "the Brooke Amendment"), S. 2864, 91st Cong., 1st Sess., § 211 (1969), specifically proposed a definition of "rent" to include "any separate charges to a tenant for reasonable utility use and for public services and facilities." That specific definition, however, was deleted from the final Act by Congress, which instead provided only for "rents (which may not exceed one-fourth of the family's income, as defined by the Secretary)." Pub. L. No. 91-152, Title II, § 213(a), 83 Stat. 389 (1969) (S.A. 7). Given this history, the plain language of the Brooke Amendment must control: "rent" means shelter cost, and if any § 1983 right to limited rent is deemed to exist, there can be no corollary right to free utilities (*e.g.*, electricity) derived therefrom, absent express congressional definition to that effect.

Indeed, the legislative history and the Act itself belie petitioners' reliance on the statute. Canons of statutory interpretation require that the Brooke Amendment language be given its plain meaning and where Congress contemplated but did not adopt language supportive of peti-



tioners' view, petitioners' view must be rejected. Petitioners have failed to establish any § 1983 right to free electricity under the Brooke Amendment and HUD regulations.

### C. The Comprehensive Enforcement Scheme Created By The Housing Act And HUD Subsidy Program Evinces Congress' Intent To Foreclose A § 1983 Action To Enforce HUD Utility Regulations.

In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981), this Court made clear that where Congress has manifested an intent to foreclose private enforcement of a statute, no § 1983 cause of action will be available. In *Sea Clammers*, respondents brought suit in federal court against state and local authorities alleging damage to fishing grounds caused by discharge of sewerage and other pollutants into the Hudson River and New York Harbor. 453 U.S. at 4-5. The suit was brought as an implied private right of action under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376, and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-1444. 453 U.S. at 4. Relying on the "elaborate enforcement provisions" of the statutes, the Court held that Congress did not intend to create any implied private rights of action under the Acts. 453 U.S. at 12-15. Although not raised by the parties, the Court also considered whether a § 1983 action would be available to respondents. 453 U.S. at 19. In making its § 1983 inquiry, the Court once again relied on the comprehensive enforcement provisions of the statutes, this time as evidence that Congress intended to foreclose § 1983 remedies. 453 U.S. at 19-21.

As in the statutes at issue in *Sea Clammers*, Congress' intent to foreclose private enforcement of HUD utility regulations is evidenced by the comprehensive enforcement

framework supporting the Housing Act subsidy program of which the utility regulations are a part. This subsidy enforcement scheme centers on HUD's enforcement authority under the Housing Act, the ACC, and agency regulations. Private enforcement of HUD utility regulations under § 1983 clearly is inconsistent with the congressional intent underlying the federal housing program.

### 1. The Comprehensive Enforcement Scheme Created By The Housing Act And HUD Subsidy Program Demonstrates Congressional Intent To Preclude A § 1983 Action In This Case.

The comprehensive enforcement framework created by the Housing Act, HUD utility regulations, and the ACC evinces Congress' intent that HUD, not a private litigant, is responsible for insuring PHA compliance with the utility regulations at issue in this case. Indeed, the regulations expressly require that HUD approve PHA-created utility allowances before they become effective. 24 C.F.R. § 865.473(a) (1980). HUD also conducts audits to evaluate PHA compliance. ACC § 311 (R. 30).

In the case of federal-state funding schemes, like that created by the Housing Act and the utility regulations, the typical remedy for state noncompliance with federally-imposed conditions is termination of funding by the federal government, not a private cause of action. *See Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 596-97 (1983); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28 (1981). The practical result is that whenever HUD speaks, a PHA listens.

RRHA, like all housing authorities participating in the federal housing program, operates its low-income projects with federal subsidies pursuant to an Annual Contributions Contract. The ACC is expressly required by Congress, 42 U.S.C. § 1437c (1985), and establishes the



relatively straightforward obligations of the PHA and HUD in providing low-cost public housing: HUD agrees to provide funds and the PHA agrees to comply with HUD requirements for the development and operation of its public housing projects. ACC §§ 2, 5, 7 (R. 30). If a housing authority breaches any of its obligations under the ACC, HUD has "the right . . . to maintain any and all actions at law or in equity against the Local Authority (PHA) to enforce correction of any such default or breach." ACC § 508 (R. 30).

Petitioners' assertion that termination of federal funding is not an available remedy when the PHA has pledged federal monies as security for payment of PHA-issued bonds. (Brief of Petitioners, p. 39), ignores the fact that this case deals solely with PHA operating funds, not PHA construction funds.[16] In fact, the ACC *does* provide for the termination of federal funds not pledged to secure PHA bonds as a remedy for PHA violations.

ACC § 401 provides for the creation of a "General Fund" into which is deposited *all* monies received by or held for account of the PHA in connection with its projects, except those funds pledged as security for the payment of principal and interest on PHA bonds. ACC § 401 (A) (R. 30). That same section provides that if a PHA is in substantial breach of the ACC, the government has a right to require the bank or other depository holding

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[16]The Housing Act and the ACC require complex bond arrangements to finance construction of public housing projects. To protect the integrity of PHA-issued bonds, and thus insure a continued flow of private funds, HUD unconditionally guarantees payment of federal funds pledged to secure those bonds. ACC §§ 509, 510 (R. 30). Although the ACC establishes that pledged federal funds may not be terminated by HUD, it does create in HUD an equally-potent alternative remedy—repossession of the project. ACC §§ 501, 502 (R. 30).

the monies of the General Fund to refuse to permit any withdrawals of such monies until the defect or breach is cured. ACC § 401(F) (R. 30). Clearly, then, the government retains the right and ability to withhold or terminate federal funds for most violations of the ACC.

The Housing Act, the interim regulations, and the Annual Contributions Contract create a comprehensive enforcement scheme centered around HUD. Under this framework, HUD maintains responsibility for establishing guidelines by which reasonable utilities are provided to tenants. 24 C.F.R. § 865.470 (1980). In addition, HUD has the duty to approve proposed PHA-calculated utility allowances and to thereafter monitor their implementation. 24 C.F.R. § 865.473 (1980). To remedy violations of the funding program, HUD specifically maintains the power in certain circumstances described above to (a) sue PHAs for breach of HUD regulations or the ACC (ACC § 508); (b) terminate or withhold federal funds (ACC §§ 401(F), 509); or (c) wrest possession of the project from the PHA (ACC §§ 501, 502). Petitioners' suit to enforce their individual claims of right against RRHA has no place in this framework.[17]

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[17]Given HUD's central role in the administration and enforcement of the interim utility regulations, it is clear that HUD, rather than RRHA, is the proper party against which petitioners should seek relief. *See, e.g., Howard v. Pierce,* 738 F.2d 722 (6th Cir. 1984) (private right of action available against HUD, but not the PHA). If petitioners can establish that HUD has refused to enforce a valid regulation, they have an action against HUD under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1980). *See also Heckler v. Chaney,* 53 U.S.L.W. 4385, 4389 (U.S. Mar. 19, 1985) (Brennan, J., concurring). Under the APA, HUD's exercise of discretion will be reviewed on an "arbitrary and capricious" basis—a standard of review far more appropriate in this context than substantive judicial review of HUD regulations as individual claims of right.



To complement the all-encompassing role it affords HUD in the formulation and enforcement of the utility allowance regulations, Congress has created in tenants a means for obtaining individual relief from excessive PHA utility surcharges. In 42 U.S.C. § 1437d(k) (1985), Congress requires that HUD by regulation establish mandatory grievance guidelines to be implemented by PHAs. Congress expressly mandated the grievance mechanism in order to retain "a realistic means for resolving disputes between tenants and PHAs quickly and fairly, before problems fester and hostilities develop."[18] H.R. Rep. No. 123, 98th Cong., 1st Sess. 35-36 (1983). *See Samuels v. District of Columbia,* 770 F.2d 184, 200-201 (D.C. Cir. 1985) (legislative history of § 1437d(k) establishes that the provision "is aimed at avoiding costly and divisive litigation between tenants and PHAs.")

Congress contemplated that the grievance procedure extend to "all disputes between a PHA and an applicant, a tenant or a former tenant." H.R. Rep. No. 123, 98th Cong., 1st Sess. 35 (1983). The HUD regulations carry this intent forward by providing that the grievance procedure shall apply to "any [individual] dispute which a tenant may have with respect to PHA action or failure to act in accordance with the individual tenant's lease or PHA regulations which adversely affect the individual tenant's rights, duties, welfare or status." 24 C.F.R. §§ 966.51, 966.53(a) (1985).[19] The grievance mechanism

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[18]Indeed, Congress added the grievance procedure to the Housing Act, 42 U.S.C. § 1437d(k) (1985), in 1983 in response to a HUD proposal to repeal its then-existing regulations concerning tenant administrative grievance requirements. H.R. Rep. No. 123, 98th Cong., 1st Sess. 35 (1983).

[19]Petitioners correctly note that the PHA grievance procedure does not apply to class grievances. 24 C.F.R. § 966.51

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thus broadly encompasses petitioners' individual utility claims in this case.

Congressional intent is thus clear. HUD has the overall responsibility for promulgating and enforcing PHA compliance with the utility subsidy regulations. To augment the vast enforcement responsibility of HUD and to ensure efficient, effective redress of individual tenant grievances arising from improperly calculated utility allowances, Congress has provided tenants a local grievance procedure. The congressional purpose evidenced by the grievance procedure is to provide tenants individual relief from PHA wrongdoing in an administrative forum that does not disrupt or threaten HUD's overall authority of the housing subsidy program. In establishing this express framework, Congress necessarily intended to preclude petitioners' § 1983 remedy.

**2. A Determination Of Whether A § 1983 Cause Of Action Is Foreclosed Under Sea Clammers Need Not Be Limited To Consideration Of Express Enunciation Of Congressional Intent.**

Read in conjunction with *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court's decision in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), suggests that a § 1983 defendant has the burden of establishing congressional intent to foreclose a § 1983 remedy. *See* 453 U.S. at 12 n.31, 27-28 n.11. In applying the *Sea Clammers* standard, however, direct

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(1985). This limitation, however, does not foreclose effective redress of *individual* tenant surcharge complaints through the grievance process. Petitioners' dissatisfaction with the individual grievance remedy cannot rebut the reality that Congress provided this scheme as an enunciation of its intent to foreclose federal judicial enforcement in these cases.



evidence of Congress' intent to foreclose a § 1983 remedy under a particular statute often is unavailable. In the absence of an express enunciation of congressional foreclosure of private remedies, legislative intent also may be established by an examination of the overall framework of the statute.

The ascertainment of congressional intent to foreclose private remedies under § 1983 and the delineation of the proper role of the federal judiciary in reviewing and enforcing federal grant legislation are based on similar public policy considerations. Either analysis focuses on the single question of congressional purpose: How can federal courts best determine the manner in which Congress intended a particular federal grant program to operate? Did Congress intend to give public housing tenants a cause of action against their PHAs for alleged violations of technical HUD utility regulations? Did Congress intend the courts to take responsibility for setting utility allowances and for reviewing individual claims of right and imposing discretionary surcharges on tenants?

Prior to this Court's 1980 decision in *Maine v. Thiboutot*, 448 U.S. 1 (1980), there was little thought that a § 1983 action was available outside the civil rights context. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979); *Hagans v. Lavine*, 415 U.S. 528, 534 n.5 (1974) (specifically reserving the question of scope of "and laws" language in § 1983). Thus, prior to 1980, the question of whether Congress intended private enforcement of a particular non-civil rights statute was resolved using the implied right of action analysis set out in *Cort v. Ash*, 422 U.S. 66 (1975).[20] Under the implied rights test, the

[20] *Cort v. Ash*, 422 U.S. 66 (1975), sets out four factors to be assessed in determining whether a private right of action should

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burden of proof falls on the plaintiff, who must show that Congress intended to create a private cause of action under the statute. *Sea Clammers,* 453 U.S. at 13.

After this Court's decision in *Thiboutot,* § 1983 was perceived as a more pervasive sword, providing an express private remedy for state violations of all federal statutes. 448 U.S. at 4. This Court, however, still looked to congressional intent to evaluate the impact of the § 1983 action on the statutory purpose of Congress, *Sea Clammers,* 453 U.S. at 20, although the burden of proof appears to fall on the defendant to show that Congress intended to foreclose a § 1983 action. 453 U.S. at 12 n.31, 27-28 n.11.

Although the burden of proof under *Cort* and *Thiboutot* differs, the cases enunciate the same essential test—congressional intent—and thus rely on the same elements of proof. This fundamental evidentiary issue of congressional purpose common to the intersection of *Cort* and *Thiboutot,* provides a clear traffic signal to direct the travel of both the express remedy created by § 1983 and the private remedy implied under the test of *Cort v. Ash.*

Petitioners assert that a § 1983 plaintiff may maintain a § 1983 cause of action in the absence of express con-

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be implied: (1) whether the statute was enacted to benefit the plaintiff, (2) whether there is an explicit or implicit indication of congressional intent to create or deny a private right, (3) whether a private right is consistent with the underlying scheme of the act, and (4) whether the contemplated right of action is traditionally relegated to state law, thus making it inappropriate to infer an exclusively federal cause of action. Subsequent cases have placed greatest importance on the second *Cort* factor, indicating that congressional intent is the threshold question in determining whether courts may imply a private right of action. *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 15-16 (1979); *Touche Ross & Co. v. Redington,* 442 U.S. 560, 575 (1979).



gressional intent to the contrary. (Brief of Petitioners, p. 29.) Petitioners thus decry the Fourth Circuit's reliance on the broad framework of the Housing Act and HUD's regulatory power to support its conclusion that Congress intended to foreclose private enforcement of the HUD utility allowance regulations in this case. (Brief of Petitioners, pp. 10, 34-40.) Petitioners assert that the *Sea Clammers* inquiry should have ended with the circuit court's finding that a § 1983 remedy was not expressly precluded under the Housing Act. This position, however, fails to recognize that at the time the Housing Act (and Brooke Amendment) were enacted, a § 1983 action was recognized only for state violations of federal civil rights statutes. *See Chapman v. Houston Welfare Rights Org.,* 441 U.S. at 600; *Hagans v. Lavine,* 415 U.S. at 534 n.5. It is illogical to expect that Congress in enacting the Housing Act and Brooke Amendment would have explicitly provided, either in the statutes or their legislative histories, foreclosure of a cause not yet believed to exist. Brown, *Whither Thiboutot? Section 1983, Private Enforcement, and the Damages Dilemma,* 33 DePaul L. Rev. 31, 57 (1983).

In asserting that Congress' silence is dispositive as to the availability of a § 1983 cause of action in suits involving non-civil rights statutes enacted prior to *Thiboutot,* petitioners confuse the burden of proof question with the evidentiary question of congressional intent. The outcome-determinative presumption propounded by petitioners as the proper focus of this Court's *Sea Clammers* analysis is merely an expression of the test for allocating the burden of proof. While *Sea Clammers* arguably assigns a § 1983 defendant the burden of proof, the test of

evidence required to meet that burden is the evidence of congressional purpose.

Given the improbability that Congress would have expressly stated an intent to foreclose § 1983 actions to enforce pre-*Thiboutot* enactments like the Housing Act and Brooke Amendment, the most logical *Sea Clammers* analysis in this situation requires that the Court look beyond the legislature's enunciated view of foreclosure to determine congressional intent. Thus, use of the broader *Cort* standard is appropriate in this circumstance because "it is the only extant mode of analysis for dealing with this phenomenon of statutes that are silent as to alternative methods of enforcement." Brown, *Whither Thiboutot?*, pp. 57-58.

Merger of the *Cort* test with the *Thiboutot* test is hardly a revoluntionary proposal. The *Cort* test, like the *Thiboutot* test, depends upon legislative intent. *Transamerica Mortgage Advisors Inc. v. Lewis*, 444 U.S. 11, 24 (1979). The *Cort* test, however, has the advantage of defining the additional factors a court must consider when a statute offers no direct evidence of congressional purpose: (a) whether the plaintiff is an intended beneficiary of the statute, (b) whether a private right is consistent with the underlying scheme of the act, and (c) whether the plaintiff's right of action is traditionally one governed by state law.

Application of the *Cort* standard to the facts of the instant case quite readily establishes that a § 1983 action to enforce HUD utility regulations is inappropriate.

The Housing Act expressly states that its purpose is "to assist the *States*" in providing decent, safe and sanitary housing to low-income families. Petitioners are not direct beneficiaries of the Housing Act subsidy program. *See supra* p. 23. (*Cort* factor (a).) The entire scheme of the Act centers on HUD. HUD promulgates regulations governing the utility subsidy and monitors the implementation and enforcement of those regulations by PHAs. Private suits to enforce individual claims of right disrupt HUD autonomy and undermine the coherence and effectiveness of HUD's funding allocation and policy objectives. Moreover, the congressional goal of fostering state involvement in the national housing program would be undermined by subjecting PHAs to potential § 1983 damage claims every time a tenant objects to a charge for use of electricity in excess of "reasonable" standards. *See supra* pp. 14-22. (*Cort* factor (b).) Finally, petitioners' action against RRHA in this case is in essence a landlord-tenant dispute. The local landlord-tenant relationship is one historically governed by state law. *See infra* pp. 38-42. (*Cort* factor (c).)



The inquiry into whether Congress intended to foreclose a § 1983 action to enforce non-civil rights statutes enacted prior to *Thiboutot* logically cannot turn only on evidence of expressly articulated congressional purpose. Congress could not be expected to expressly foreclose a remedy which was not yet recognized. To determine congressional intent in this situation, a broader analysis of the nature and purpose of the statute and the practical effect a § 1983 remedy would have on the overall scheme of the enactment necessarily must be considered. This is particularly true where the § 1983 rights claimed by petitioners arise from agency regulations promulgated pursuant to a national subsidy program, rather than from direct

congressional action. Nevertheless, even under the narrower *Sea Clammers* analysis propounded by petitioners, the congressional framework of the Housing Act, the congressionally-mandated ACC and tenant grievance procedure, and HUD's ability to control or terminate PHA funding evidences a clear congressional intent to foreclose a § 1983 action to enforce the HUD utility allowance regulations.

## II. Petitioners' Claim That RRHA Breached Its Lease With Its Tenants Is A Pendent Claim For Which Federal Jurisdiction Cannot Exist Independent Of Petitioners' § 1983 Claim.

Tenants of public low-income housing occupy their units subject to the requirements of their residential lease contract with the managing PHA. The lease governs such fundamental tenant issues as occupancy, rent, security deposits, and damage and repair. It also defines the management obligations and operating procedures of the PHA, including maintenance, termination of the lease, inspection of the premises, and tenant grievances. *See generally* RRHA Lease (R. 5, exh. H).

Petitioners argue that RRHA's alleged failure to furnish them with free "utilities as reasonably necessary" pursuant to paragraph 4 of the lease agreement between RRHA and its tenants raises a question of federal law. (Brief of Petitioners, p. 44.) The lease between RRHA and petitioners, however, creates an archetypical landlord-tenant relationship, the dynamics of which properly and necessarily are governed by state law. Petitioners recognize this and agree that "[t]he tenants' claim on their lease is a classic contract action recognized in the common law. ..." (Brief of Petitioners, p. 45.)



In an attempt to elevate their state lease claim to a matter of federal law, petitioners principally rely on *Gully v. First National Bank,* 299 U.S. 109 (1936). In *Gully,* this Court acknowledged that 28 U.S.C. § 1331 may give federal courts jurisdiction of state-created actions where "a right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action." 299 U.S. at 112. Such a federal claim must be apparent from the face of plaintiff's complaint. *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1 (1983). In *Gully,* however, the Court refused to find federal question jurisdiction in the petitioner's state-created cause of action, concluding that a federal statute permitting state taxation of shares of a national bank was not an "essential element" of petitioner's state law breach of contract claim for taxes against the respondent bank. 299 U.S. at 115 ("Not every question of federal law emerging in a suit is proof that federal law is the basis of the suit."). Similarly, in *Franchise Tax Board,* this Court found that the state tax authorities' suit to collect unpaid state income taxes by levying on funds held under an ERISA-covered benefit plan did not require resolution of a substantial question of federal law. 463 U.S. at 13, 21-22.

As in the *Gully* and *Franchise Tax Board* cases, federal law is merely incidental to petitioners' state lease claim in this action. Paragraph 4 of RRHA's standard lease contractually obligates RRHA to provide its tenants "utilities as reasonably necessary," the amounts of which are "posted on the bulletin board of each Housing Development office." RRHA Lease, ¶ 4 (R. 5, exh. H). Petitioners' alleged "right" to reasonable free utilities (*i.e.*,

the amount of the posted allowances) is created by the lease contract itself. Alleged deprivation of that state contractual right must necessarily be redressed in state court. If the fact that federal directives require RRHA to provide tenants the utility allowances described in the lease is accepted as a basis of federal jurisdiction, every provision of every public housing lease creates a federal cause of action.

The lease agreement between RRHA and petitioners, like all PHA-tenant leases, contains terms and conditions required by Congress, 42 U.S.C. § 1437d(1)(1985), and HUD, 24 C.F.R. §§ 966.1-.6 (1985) (S.A. 19-27). Indeed, RRHA's lease has its origin in the standard form recommended by HUD to insure PHA compliance with the long list of statutory and regulatory requirements. HUD Circular RHM 7465.8 (Feb. 2, 1971) (Appendix I) (*lodged with the Clerk for the convenience of the Court). Among the many federal obligations that the HUD regulations by lease impose upon a PHA are the requirements that the PHA (1) specify the utilities and quantities thereof furnished tenants without cost; (2) maintain the premises; (3) make repairs; (4) provide appropriate garbage receptacles; and (5) adhere to certain notice procedures. 24 C.F.R. § 966.4 (1985).

If a federal question could be found in the mere fact that the terms of the PHA standard lease are defined by federal regulation or statute, virtually every public housing landlord-tenant dispute would find its way into federal court. Pursuant to 42 U.S.C. § 1437d(1)(2)(1985) and 24 C.F.R. § 966.4(e)(1)(1985), paragraph 9 of the standard lease plainly provides:

> Management Agent will maintain the premises and the Housing Development in decent, safe and sanitary condition in conformity with the requirements of local housing codes *and applicable lawful regulations of the Department of Housing and Urban Development materially affecting health and safety.*



RRHA Lease, ¶ 9 (R. 5, exh. H) (emphasis added).

Accepting petitioners' argument that a state court's reference to federal regulations in reviewing the terms of a state-created landlord-tenant contract gives rise to a federal question, a tenant breach of contract claim premised on the PHA's failure to make repairs or to provide enough hot water could be brought before the federal courts as a violation of paragraph 9. Every broken door and window, every plumbing failure would be a federal issue. The federal courts would become the arbitrators of the most fundamental, and sometimes trivial, landlord-tenant disputes. The cause of federalism is in no way served by imposing on the already over-burdened federal judiciary responsibility for local landlord-tenant disputes, the resolution of which history has shown state courts so adept.

The true purpose of petitioners' argument is revealed in their correct assertion that Virginia recognizes no class action remedy. (Brief of Petitioners, p. 49.) In seeking federal resolution of their state-created contract claims, petitioners attempt to supplant the available state court remedies for violations of ordinary contract and lease rights. Petitioners' contention that resolution of tenant lease claims can be accomplished in Virginia only in state courts not of record is inaccurate. (Brief of Petitioners, p. 49.) In truth, an appeal to a circuit court of record lies as a matter of right from a court not of record in all cases in which the matter in controversy exceeds

$50.00. Va. Code § 16.1-106 (1982 (S.A. 7). Certainly, most tenant lease claims, including those in the instant case, would meet this state jurisdictional threshold for a court of record determination. Petitioners' landlord-tenant lease claim is properly a matter for state court adjudication. Petitioners' dissatisfaction with state-created remedies does not change the essential nature of that claim.

## III. Damages Should Not Be An Available Remedy Under § 1983 Where The Source Of Recovery Will Be Federal Grant Monies.

Petitioners seek as their sole remedy in this § 1983 action compensatory damages in the amount of the utility surcharges collected by RRHA in alleged violation of HUD's allowance scheme. This Court has recognized, however, that such "make whole" remedies are inappropriate in private actions to redress unintentional violations of federal funding programs by recipients of government funds. *Guardians Ass'n v. Civil Service Comm'n,* 463 U.S. 582, 596 (1983) (White, J., plurality) (citing *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 15 (1981)). Thus, even if petitioners are found to have stated a private statutory claim cognizable in federal court, the sole remedy they seek—compensatory damages—is unavailable in the context of the federal housing program. Whether a litigant has a cause of action "is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." *Davis v. Passman,* 442 U.S. 228, 239 (1979).

The threat that § 1983 damages and awards of attorneys' fees present to the effective administration of grant programs was recognized by this Court in *Pennhurst State*



*School and Hospital v. Halderman,* 451 U.S. 1 (1981). In that case, the majority suggested that the remedy for failure to comply with federally-imposed conditions should be limited to prospective relief. 451 U.S. at 29. Relying on *Pennhurst,* Justice White in a plurality opinion in *Guardians Ass'n v. Civil Service Comm'n,* 463 U.S. 582, 599 (1983), adopted a presumption that a damage remedy should not be available for unintentional violations of programs created pursuant to the congressional spending power.[21]

In *Guardians,* minority police officers challenged written examinations administered by New York City to make appointments to the City Police Department. The plaintiffs claimed that the examination had a discriminatory impact on the scores, pass rates and subsequent lay-offs of minority officers. 463 U.S. at 585. The officers' claim was brought under several theories, including Titles VI and VII of the Civil Rights Act of 1964. A § 1983 claim for damages was made based on the violation of Title VI.[22]

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[21]This presumption that damages are unavailable for violations of Spending Clause legislation can be rebutted by persuasive evidence of contrary legislative intent. *Guardians,* 463 U.S. at 599 (White, J., plurality). In the present instance, petitioners have provided no evidence that Congress intended public housing tenants to obtain damage awards through private enforcement of HUD regulations.

[22]A review of the Justices' positions reveals that *Guardians* was not a true § 1983 case, although its rationale for a no-damages presumption remains valid for § 1983 purposes. *See infra* pp. 44-47. In *Guardians,* Justice White, joined by Justice Rehnquist, applied implied private rights language to review the availability of private enforcement of Title VI and concluded that damages should not be available for such violations. 463 U.S.

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463 U.S. at 586. Justice White concluded that the remedy available for unintentional violations of federal grant programs necessarily must be limited to prospective relief, recognizing the privilege of the recipient of federal funds to withdraw and terminate its receipt of federal money rather than assume the cost of complying with court-imposed burdens. 463 U.S. at 596 (citing *Rosado v. Wyman*, 397 U.S. 397, 420-21 (1970)).

Implicit in Justice White's analysis in *Guardians* is the recognition that voluntary federal-state grant programs, such as the public housing program, provide valuable social benefits that Congress seeks to encourage through federal subsidy. The spectre of unpredictable liability for damages and attorneys' fees for violations of complex calculation schemes like that of the interim utility regulations in this case cannot but operate as a disincentive to state actors contemplating participation in grant programs. Furthermore, such monetary awards and

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at 584. Justice Powell and Chief Justice Burger, likewise, examined the case under an implied right of action analysis, finding no private rights existed and adding that § 1983 causes of action are unavailable where violations of Title VI are concerned. 463 U.S. at 610 n.3. Justice O'Connor expressly reserved judgment on the issue of the availability of a private cause of action under Title VI. 463 U.S. at 613 n.1. Justice O'Connor's conclusion that the minority police officers in *Guardians* failed to prove intentional discrimination as required under Title VI regulations provided the fifth vote in finding that damages were unavailable to the claimants. 463 U.S. at 613. Justice Marshall's dissent flatly rejected Justice White's no-damages presumption, but did so without specific reference to § 1983. 463 U.S. at 615. Justices Stevens, Brennan, and Blackmun dissented, specifically raising the minority officers' reliance on § 1983 under *Thiboutot* and the general availability of damages under that statute. 463 U.S. at 635.



the cost of litigation divert limited federal funds allocated by Congress for specific program goals away from their most effective uses, thereby frustrating the purposes of the statute involved.

As in *Guardians*, RRHA's receipt of federal funds during the pendency of the interim utility regulations arose from a consensual federal-state relationship. Prior to entering the housing program, HUD defined and evaluated RRHA's plan for compliance, and RRHA evaluated the benefits and burdens of the federal conditions tied to receipt of government funds. Petitioners' assertion that HUD financially benefits by failing to enforce the now-defunct interim regulations entirely misses the point that HUD set the rate of utility allowances in the first place and that HUD—and RRHA—operate on limited budgets. The monetary relief petitioners seek must come from somewhere. Such relief necessarily has its source in other funded projects and is provided at the expense of other individuals in need of government aid, indeed, at the expense of the petitioners themselves as residents of RRHA-managed public housing.[23]

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[23]Cognizant of the implication in *Guardians* that monetary damages are inappropriate for alleged violations of Spending Clause legislation, petitioners attempt to characterize the relief they seek as "restitution." Mere semantics, however, cannot overcome the *Guardians* rationale that retrospective monetary relief in the context of federal grant programs discourages voluntary state participation in vital programs, diverts funds from the specific program goals Congress sought to address and usurps agency discretion to determine the best allocation of limited federal resources. Indeed, in his opinion in *Guardians*, Justice White relied on *Edelman v. Jordan*, 415 U.S. 651, 667 (1974), to specifically find that "relief in the grant context cannot

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Private enforcement suits involving government spending programs can be evaluated only in a broad context which takes into account the total public effort involved. Public grant programs that rely on federal financial aid necessarily achieve only rough justice. The programs distribute limited funds to a limited sector of the problem population. Consistent with these limitations, a federal agency, HUD in this case, has the ability and resources to remedy only the most pervasive violations of its public projects. And, consonant with this view, it often may be improper and counterproductive for the judiciary to attempt specific justice, particularly where such relief includes damage awards. When a program's funds are diverted from program goals in order to pay damage awards and attorneys' fees to an aggrieved individual, another needy person is denied necessary benefits or services. *See* R. Cappalli, *Grants and Cooperative Agreements* § 8:37 (1982). In this context, HUD must be free to allocate its limited funds to projects that HUD, in its discretion, believes will best advance its goals for a cohesive national housing program.

During HUD audits of public housing authorities a large number of technical violations often come to light. HUD must exercise its discretion to balance numerous tenant claims to achieve the most effective allocation of limited agency funds. As this Court noted in *Heckler v.*

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include a monetary award for past wrongs, even if the award is in the form of 'equitable restitution' instead of damages." 463 U.S. at 604.



*Chaney*, 53 U.S.L.W. at 4387, a court with but a single technical violation before it, cannot properly analyze the funding decisions facing agency officials. This point was correctly recognized by the Fourth Circuit below. (J.A. 36 n.7).

HUD is uniquely positioned to know where its limited funds can be put to best use. Judicially-imposed § 1983 damage awards can only hinder the effective allocation of those funds. This Court's holding in *Bell v. New Jersey*, 461 U.S. 773, 794 (1983) (White, J., concurring), clearly confirms the power of the federal government to assert its rights against a grant recipient that fails to comply with the terms of a grant agreement and to force the violator to repay misspent funds. It is an entirely different matter, however, to subject a state grantee to open-ended liability at the hands of private plaintiffs under § 1983. *Guardians*, 463 U.S. at 603 n.24 (White, J., plurality).

If this Court believes that petitioners should have a § 1983 cause of action against RRHA to challenge RRHA's alleged violation of HUD utility allowance regulations, the only practical remedy available to petitioners is prospective injunctive relief. Such relief has long been foreclosed by RRHA's recalculation of its utility allowances in response to HUD's latest amendment of its regulatory scheme. (R. 33).

—o—

## CONCLUSION

For these reasons, the judgment of the Court of Appeals for the Fourth Circuit dismissing petitioners' action should be affirmed.

Respectfully submitted,

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## STATUTORY APPENDIX

42 U.S.C. § 1983. Civil action for deprivation of rights (1985)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 1331. Federal question (1985)

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

42 U.S.C. § 1437. Declaration of policy (1985)

It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this Act, to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income and, consistent with the objectives of this Act [42 USCS §§ 1437-1437j], to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs. No person should be barred from serving on the board of directors or similar governing body of a local public housing agency because of his tenancy in a lower income housing project.

42 U.S.C. § 1437a. Rental payments; definitions (1985)

(a) Dwelling units assisted under this Act shall be rented only to families who are lower income families at

the time of their initial occupancy of such units. Reviews of family income shall be made at least annually. A family shall pay as rent for a dwelling unit assisted under this Act (other than a family assisted under section 8(o) [42 USCS § 1437f(*o*)] the highest of the following amounts, rounded to the nearest dollar:

(1) 30 per centum of the family's monthly adjusted income;

(2) 10 per centum of the family's monthly income; or

(3) if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payments which is so designated.

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42 U.S.C. § 1437c. Annual contributions for lower income housing projects (1985)

(a) The Secretary may make annual contributions to public housing agencies to assist in achieving and maintaining the lower-income character of their projects. The Secretary shall embody the provisions for such annual contributions in a contract guaranteeing their payment. The contribution payable annually under this section shall in no case exceed a sum equal to the annual amount of principal and interest payable on obligations issued by the public housing agency to finance the development or acquisition cost of the lower-income project involved. The amount of annual contributions which would be established for a



newly constructed project by a public housing agency designed to accommodate a number of families of a given size and kind may be established under this section for a project by such public housing agency which would provide housing for the comparable number, sizes, and kinds of families through the acquisition and rehabilitation, or use under lease, of structures which are suitable for lower-income housing use and obtained in the local market. Annual contributions payable under this section shall be pledged, if the Secretary so requires, as security for obligations issued by a public housing agency to assist the development or acquisition of the project to which annual contributions relate and shall be paid over a period not to exceed forty years.

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42 U.S.C. §1437d(k) (1985)

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(k) The Secretary shall by regulation require each public housing agency receiving assistance under this Act to establish and implement an administrative grievance procedure under which tenants will—

(1) be advised of the specific grounds of any proposed adverse public housing agency action;

(2) have an opportunity for a hearing before an impartial party upon timely request within any period applicable under subsection (*l*);

(3) have an opportunity to examine any documents or records or regulations related to the proposed action;

(4) be entitled to be represented by another person of his choice at any hearing;

(5) be entitled to ask questions of witnesses and have others make statements on his behalf; and

(6) be entitled to receive a written decision by the public housing agency on the proposed action.

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42 U.S.C. § 1437f (1985)

• • •

(c) (1) An assistance contract entered into pursuant to this section shall establish the maximum monthly rent (including utilities and all maintenance and management charges) which the owner is entitled to receive for each dwelling unit with respect to which such assistance payments are to be made. The maximum monthly rent shall not exceed by more than 10 per centum the fair market rental established by the Secretary periodically but not less than annually for existing or newly constructed rental dwelling units of various sizes and types in the market area suitable for occupancy by persons assisted under this section, except that the maximum monthly rent may exceed the fair market rental by more than 10 but not more than 20 per centum where the Secretary determines that special circumstances warrant such higher maximum rent or that such higher rent is necessary to the implementation of a local housing assistance plan as defined in section 213(a)(5) of the Housing and Community Development Act of 1974 [42 USCS § 1439(a)(5)]. In the case of newly constructed and substantially rehabilitated units, the exception in the preceding sentence shall not apply to more than 20 per centum of the total amount of authority to enter into annual contributions contracts for such units which is allocated to an area and obligated with respect to any fiscal year beginning on or after October 1, 1980. Proposed fair market rentals



for an area shall be published in the Federal Register with reasonable time for public comment, and shall become effective upon the date of publication in final form in the Federal Register. Notwithstanding any other provision of this section, after the date of enactment of the Housing and Community Development Act of 1977 [enacted Oct. 12, 1977], the Secretary shall prohibit high-rise elevator projects for families with children unless there is no practical alternative.

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(j) (2)(A) A contract entered into pursuant to this paragraph shall establish the maximum monthly rent (including maintenance and management charges) which the owner is entitled to receive for the space on which a manufactured home is located and with respect to which assistance payments are to be made. The maximum monthly rent shall not exceed by more than 10 per centum the fair market rental established by the Secretary periodically (but not less than annually) with respect to the market area for the rental of real property suitable for occupancy by families assisted under this paragraph.

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UNITED STATES HOUSING ACT, Ch. 896, § 2, 50 Stat. 888 (1937)

When used in this Act—

(1) The term "low-rent housing" means decent, safe, and sanitary dwellings within the financial reach of families of low income, and developed and administered to promote serviceability, efficiency, economy, and stability, and embraces all necessary appurtenances thereto. The dwellings in low-rent housing as defined in

this Act shall be available solely for families whose net income at the time of admission does not exceed five times the rental (including the value or cost to them of heat, light, water, and cooking fuel) of the dwellings to be furnished such families, except that in the case of families with three or more minor dependents, such ratio shall not exceed six to one.

PUB. L. No. 86-372, § 503, 73 Stat. 654 (1959)

(a) Paragraph (1) of section 2 of the United States Housing Act of 1937 is amended to read as follows:

"(1) The term 'low-rent housing' means decent, safe, and sanitary dwellings within the financial reach of families of low income, and developed and administered to promote serviceability, efficiency, economy, and stability, and embraces all necessary appurtances thereto. The dwellings in low-rent housing shall be available solely for families of low income. Income limits for occupancy and rents shall be fixed by the public housing agency and approved by the Authority after taking into consideration (A) the family size, composition, age, physical handicaps, and other factors which might affect the rent-pay ability of the family, and (B) the economic factors which affect the financial stability and solvency of the project."

(b) Paragraph (7) (b) of section 15 of such Act is amended by inserting after "a gap of at least 20 per centum" the following "(or 5 per centum in the case of any family entitled to a first preference as provided in section 10(g)".



PUB. L. No. 91-152, § 213(a), 83 Stat. 389 (1969)

The second paragraph of section 2(1) of the United States Housing Act of 1937 is amended by inserting after "rents" the following: "(which may not exceed one-fourth of the family's income, as defined by the Secretary)".

Va. Code § 16.1-106 (1982)

§ 16.1-106. Appeals from courts not of record in civil cases.—From any order entered or judgment rendered in a court not of record in a civil case in which the matter in controversy is of greater value than fifty dollars, exclusive of interest, any attorney's fees contracted for in the instrument, and costs, or when the case involves the constitutionality or validity of a statute of the Commonwealth, or of an ordinance or bylaw of a municipal corporation, there shall be an appeal of right, if taken within ten days after such order or judgment, to a court of record. Such appeal shall be to a court of record having jurisdiction within the territory of the court from which the appeal is taken. (1956, c. 555; 1977, c. 624.)

24 C.F.R. § 865.470 Purpose. (1980)

The purpose of §§ 865.470 through 865.482 is to establish procedures to be used by PHAs in establishing and administering Allowances for PHA-Furnished Utilities and Allowances for Tenant-Purchased Utilities. Allowances for PHA-Furnished Utilities represent the maximum consumption units (e.g., kilowatt hours of electricity) which may be used by a dwelling unit without a surcharge for excess consumption against the tenant. Allowances for Tenant-Purchased Utilities represent fixed dollar

amounts which are deducted from the Gross Rent otherwise chargeable to a tenant who pays the actual Utility charges directly to the Utility suppliers whether they be more or less than the amounts of the Allowances.

24 C.F.R. § 865.471 Applicability. (1980)

(a) Except as provided in paragraph (b) of this section, §§ 865.470 through 865.482 apply to all dwelling units assisted under the United States Housing Act of 1937 in projects owned by or leased to PHAs and leased or subleased by PHAs to tenants, except the Section 8 Housing Assistance Payments Program and the Mutual Help Homeownership Opportunities Program.

(b) Sections 865.470 through 865.482 do not apply to dwelling units which are served by PHA-Furnished Utilities unless Checkmeters have been installed to measure the actual Utilities consumption of the individual units but tenants in such units are subject to charges for consumption of tenant-owned major appliances in accordance with § 866.4 of this chapter.

24 C.F.R. § 865.472 Definitions. (1980)

Checkmeter. A device for measuring Utility consumption of each individual dwelling unit where the Utility service is supplied through a Mastermeter System. The PHA pays the Utility supplier for the Utility service on the basis of the Mastermeter readings and uses the Checkmeters to determine whether and to what extent of the Utility consumption of each dwelling unit is in excess of the Allowances for PHA-Furnished Utilities.

Contract Rent. The amount of rent payable by the tenant to the PHA. In the case of PHA-Furnished Utilities, the Contract Rent is the same as the Gross Rent. In the case of Tenant-Furnished Utilities the Contract Rent is the Gross Rent minus the amount of the Allowances for Tenant-Purchased Utilities. This definition of Contract Rent is not the same as contract rent for purposes of 24 C.F.R. Parts 880 to 889.



Gross Rent. The rent chargeable to a tenant for the use of the dwelling accommodation and equipment (such as range and refrigerator, but not including furniture), services, and Utilities not to exceed the Allowances for PHA-Furnished Utilities or the Allowances for Tenant-Purchased Utilities, as applicable. This definition of Gross Rent is not the same as gross rent for purposes of 24 C.F.R. Parts 880 to 889.

Mastermeter System. A Utility distribution system in which a PHA is supplied Utility service by a Utility supplier through a meter or meters and the PHA then distributes the Utility service to its tenants.

Surcharge. The amount charged by the PHA to a tenant, in addition to the tenant's Contract Rent, for consumption of Utilities in excess of the Allowance of PHA-Furnished Utilities included in the Contract Rent.

Utility. Electricity, gas, heating fuel, water and sewage service, and trash and garbage collection. Telephone service is not included as a Utility.

24 C.F.R. § 865.473 Establishment of allowances of PHAs. (1980)

(a) Basic Requirement. PHAs shall establish (1) allowances for PHA-Furnished Utilities for all Checkmetered Utilities and (2) allowances for Tenant-Purchased Utilities for all Utilities purchased directly by tenants

from the Utilities supplier. These Allowances shall be incorporated into the PHA's rent schedules and shall be submitted for approval by the HUD field office, after compliance with requirements of notice to tenants prescribed under 24 C.F.R. Part 861.

(b) Authorized Uses of Utilities on which Allowances Are Based. Allowances for both PHA-Furnished and Tenant-Purchased Utilities shall be designed to include Utility consumption requirements for major equipment furnished by the PHA (for example, heating furnace, hot water heater, range and refrigerator) and for minor items of equipment (such as toasters and can openers) furnished by the tenants. To avoid misunderstanding, the PHA shall include with the rent schedules a statement of the specific items of major equipment whose Utility consumption requirements were included in determining the amounts of the Allowances. This does not mean that tenants may not supply and use other items of major equipment, but if they do so the cost of any Utility consumption in excess of the applicable allowance will have to be borne by the tenant.

24 C.F.R. § 865.474 Dwelling Unit categories for establishing of allowances. (1980)

(a) Structure type Categories. Separate Allowances shall be established for each utility and for each category of dwelling units within structures which are reasonably comparable as to age and construction type, have the same utility combination and the same type and size of major equipment. Walk-up apartments, elevator buildings, row or townhouse dwellings, and detached or semi-detached dwellings shall constitute different structure types, but consideration may also be given to other major construc-



tion differences which have a significant effect on utility consumption. Generally, PHAs should include in the same structure type category all structures of similar design and equipment which were constructed at about the same time and are located within an area which experience very similar weather conditions.

(b) Scattered site units. In the case of scattered site dwelling units which were acquired by the PHA, with or without rehabilitation, the PHA shall determine to what extent the units are comparable so as to permit their being treated as one structure type category for purposes of establishing Allowances. If the number of units which can be reasonably so grouped is insufficient for this purpose (i.e., generally, less than 25 units), the PHA should include in its data base the best available Utility consumption data with respect to comparable units not in the PHA's program. In such cases, the PHA shall monitor the consumption experience of the units within its program as well as the non-PHA units, and thereafter revise its data base in light of that experience (see § 865.476).

(c) Dwelling Unit Categories by Size of Dwelling Unit. Within each structure type category, separate Allowances shall be established for units of different size, i.e., Efficiency or 0-bedroom, 1-bedroom, 2-bedroom, 3-bedroom, 4-bedroom, 5 or more-bedroom. Variations shall not be made for such factors as dimensions of the rooms or dwelling units and generally not by reason of factors such as upper or lower floor, number of exposed walls, or direction of exposure. However, if the PHA determines that there are sufficient differences between dwelling units it may dsignate a category to reflect those differences.

24 C.F.R. §§ 865.475 Charactristics of allowances. (1980)

(a) For PHA-Furnished Utilities. Preference shall be given to setting Allowances on a quarterly basis appropriately adjusted to reflect season variations, because this results in lower costs for meter reading and bookkeeping, and may also reduce the number of tenants surcharged due to averaging consumption over the three-month period. Monthly Allowances may be used where justified by special circumstances such as high tenant turnover or where excess consumption is extremely high. If in a locality the billing for a Utility, such as water and sewage service, is on a longer-term basis, such as semi-annually, the Allowance computed for that Utility may be set for a corresponding period and prorated to the quarterly allowance.

(b) Tenant-Purchased Utilities. The amount of the Allowance for Tenant-Purchased Utilities is deducted from the Gross Rent in computing the amount of the Contract Rent payable by the tenants to the PHA. Monthly Allowances shall be established at a uniform amount, based on average monthly utility requirements for a year; however where utility company level payment plans (customers of a utility company pay to the utility company a uniform amount each month) are unavailable to PHA tenants and a uniform monthly allowance may result in hardships the allowances established may provide for seasonal variations. HUD, if approving this action, will provide the PHA with instructions regarding adjustments necessary in the rental income estimates used for computation of operating subsidy payable under the Performance Funding System.



24 C.F.R. § 865.476 Data upon which allowances shall be based (PHA-Furnished and Tenant-Purchased Utilities). (1980)

(a) Where records are available for the particular housing. The portion of the Allowance applicable to each Utility shall be based upon the consumption records (consumption and cost records in the case of Tenant-Purchased Utilities) for the particular structure type category (§ 865.474) for the most current three-year period. Because of seasonal variations in the use of Utilities, each year shall consist of 12 consecutive months. If records are not available for a three-year period, the PHA shall use records for the most current two-year period or, if such records are unavailable, for the most current one-year period. If records are not available for the particular housing category for the entire year, records for the most comparable PHA housing will be used. Allowances based on records for only a one-year period should be adjusted for normal weather conditions.

(b) Where records are not available for the particular housing. For new housing or existing housing for which adequate records covering a full year are not available, the Allowances shall be based on records for the most comparable PHA housing in the area as to construction type and size of units, utility combinations, climatic conditions, and types of equipment. Utilities data for comparable projects shall be obtained from the records of PHAs, the Utility suppliers or the HUD Field Office. See also § 865.474(b) with respect to scattered site dwelling units.

(c) Source of data for Tenant-Purchased Utilities. In the case of Tenant-Purchased Utilities, the PHA must establish a special procedure for obtaining the consumption data for those dwelling units. The PHA shall utilize

a method which it finds best taking into consideration practicability, reliability, and administrative cost. Such methods may include, for example, arrangements with Utility suppliers to furnish consumption data to the PHA (without identification of the users, if the Suppliers so prefer); meter readings by the PHA; having the tenants furnish copies of their utility bills (or making them available for copying) in connection with the payments of their monthly rents.

24 C.F.R. § 865.477 Standards for allowances for PHA-furnished utilites. (1980)

The Allowances for PHA-Furnished Utilities for each dwelling unit category and unit size shall be established in terms of consumption units, sufficient to meet the requirements of about 90% of the dwelling units in the category. Conversely, the Allowances should be such as are likely to result in surcharges for about 10% of the dwelling units. The basic method of determining the Allowances should be as follows:

(a) The dwelling unit consumption data for all units within each dwelling unit category and unit size should be listed in order from low to high consumption for each billing period.

(b) The PHA should determine whether there are any unusually high instances of consumption which might be due to unusual individual circumstances, wasteful practices, or use of the Utility for tenant-supplied major appliances. The PHA should exclude such cases from consideration in calculating the amount of the allowance.

(c) Where the available data covers two or more years, averages should be computed and adjustments made, if warranted, by reason of abnormal weather conditions or



other changes in circumstances affecting utility consumption.

(d) The Allowances should then be established at the level which can reasonably be expected to meet the requirements of 90% of the dwelling units in the category. 24 C.F.R. § 865.478 Standards for allowances for tenant-purchased utilities. (1980)

In the case of Tenant-Purchased Utilities, the Allowance is provided in terms of a fixed number of dollars made available to each tenant in the dwelling unit category for purposes of paying his or her Utility bills. If a tenant's Utility expense is less than the Allowance, the tenant retains the benefit, while if a tenant's Utility expense is more than the Allowance, the tenant must absorb the excess cost. In these circumstances, in order for the total Utility expense to the PHA for the particular dwelling unit category to be equal to the total of the Utility bills for all the dwelling units in that caetgory, the amount of the Allowance for each dwelling unit must be established at the average amount per dwelling unit. Accordingly, the basic method of determining the Allowance should be as follows:

(a) Proceed as stated in paragraphs (a) through (c) of § 865.477.

(b) Determine the total amount of consumption for each month for all the dwelling units in the category, and divide by the number of dwelling units, in order to obtain the average amount of consumption per dwelling unit for that month.

(c) Apply the current rate structure of the Utility supplier to each month's average amount of consumption

in order to compute the dollar cost of each month's average amount of consumption. The result will be the monthly Allowances for Tenant-Purchased Utilities for the particular Utility and dwelling unit category involved.

24 C.F.R. § 865.479 Surcharge for excess consumption of PHA-furnished utilities. (1980)

PHAs shall include in their rent schedules for dwelling units subject to Allowances for PHA-Furnished Utilities, schedules of Surcharges indicating the additional dollar amounts tenants will be required to pay for Utility consumption in excess of the Allowances. These Surcharge Schedules may show the amounts of Surcharge for specific blocks of excess consumption rather than amounts computed on a straight per-utility-unit basis. The amount of the Surcharge for each block shall be computed by applying the Utility Supplier's average rate to the amount of excess consumption.

24 C.F.R. § 865.480 Review and revision of allowances. (1980)

(a) Revision by Reason of Inadequate Data Base (for PHA-Furnished Utilities). Where the data base for establishment of the Allowance consisted of less than three years for the particular housing, the PHA shall review the Allowances at the end of each year, taking into consideration the data for the particular housing, until an Allowance based on records for three years for the particular housing has been established.

(b) Allowance for PHA-Furnished Utilities. (1) At the end of each quarterly or other billing period, in connection with the determination of surcharges, the PHA



shall determine the number and percentage of tenants who are subject to surcharge. When the PHA finds that the percentage of surcharge cases is more than 25 percent of a category and there is no reason of a non-recurring nature (such as weather extremes) to account for this, the PHA shall review the consumption data and if appropriate, establish a revised Allowance in accordance with § 865.477.

(2) No separate revisions in the allowance by reason of changes in Utility rates are necessary because the PHA is billed directly by the Utility suppliers at their current rates and, by the same token, the PHA uses current rates in computing surcharges.

(c) Allowances for Tenant-Purchased Utilities. (1) Since the tenants in these cases are billed directly by the Utility suppliers at their current rates, the PHA shall monitor the rates on a monthly basis. Whenever there is a rate change which, by itself or together with prior rate changes not adjusted for, results in a change of 10 percent or more, the PHA shall revise the Allowance accordingly.

(2) The average consumption levels on which the Allowances are based shall be reviewed and revised in accordance with § 865.478 in the event of any change in circumstances indicating probability of a significant change in average consumption levels, but in any event once every three years.

(d) Effective Date of Revised Allowances. In order to allow a reasonable time for PHA determination and processing of a revision in Allowances, a revised Allowance shall take effect with the next billing period following compliance with requirements of notice to tenants prescrib [sic] under 24 C.F.R. Part 861.

24 C.F.R. § 865.481 Individual relief. (1980)

(a) Requests for relief from surcharges for excess consumption of PHA-Furnished Utilities or from Utility supplier billings in excess of the Allowances for Tenant-Purchased Utilities may be submitted to the PHA on the following grounds:

(1) The consumption for the billing period is so far out of line with previous billing periods (seasonally adjusted) as to indicate a possible defect in the meter or error in the meter reading.

(2) A defect in the dwelling unit of PHA-Furnished equipment is causing a substantial and abnormal increase in Utility consumption. The term "defect" means a condition which the PHA has a duty to repair, such as windows or doors which do not close in accordance with their original design, broken windows, damaged walls, etc. The term "defect" does not include a deficiency in the original design, such as inadequate insulation by current standards, absence of storm windows, etc.

(3) In the case of Tenant-Purchased Utilities only, that the utility consumption exceeds the applicable Allowance by 20 percent or more for reasons other than wasteful or unauthorized usage.

(b) Requests for relief on the grounds authorized by this section shall be investigated by the PHA, which shall conduct or cause to be conducted, an energy audit of the unit to determine whether excess utility consumption is reasonable, given the characteristics of the specific dwelling unit, and appropriate relief shall be granted in accordance with the findings of the PHA.



(c) Where the PHA finds that excess utility consumption is due to wasteful or unauthorized usage, the PHA shall advise and assist the tenant on methods of reducing the utilities usage. This advice and assistance may include counseling, installation of new energy conserving equipment or appliances and corrective maintenance.

24 C.F.R. § 865.482 Establishment of allowances under §§ 865.470 through 865.481. (1980)

It is recognized that a reasonable time must be allowed for PHAs to assemble the records and data and establish allowances in accordance with the standards and procedures set forth in §§ 865.470 through 865.481, after providing an opportunity for tenant comment as required by § 866.5 of this chapter. Accordingly, PHAs shall proceed to accomplish these results as promptly as possible, but shall establish such allowances effective as of a date no later than 120 days from the effective date of this rule or extended date, if approved by HUD.

24 C.F.R. § 966.4 Lease Requirements (1985)

A lease shall be entered into between the PHA and each tenant of a dwelling unit which shall contain the provisions described hereinafter.

(a) *Identification of parties and premises.* The names of the parties to the leases and the identification of the premises leased shall be set forth, including:

(1) The term of the lease and provisions for renewal, if any;

(2) The members of the household who will reside in the unit.

(b) *Payments due under the lease.* (1) The lease shall state the amount fixed as rent, specifying the utilities and quantities thereof and the services and equipment furnished by the PHA without additional cost.

(2) The lease shall provide for charges to tenants for maintenance and repair beyond normal wear and tear and for consumption of excess utilities. The lease shall state the basis for the determination of such charges (e.g., by a posted schedule of charges for repair, amounts charged for utility consumption in excess of the allowance stated in the lease, etc.). The imposition of charges for consumption of excess utilities is permissible only if such charges are determined by an individual check meter, servicing the leased unit or result from the use of major tenant-supplied appliances.

(3) At the option of the PHA, the lease may provide for:

(i) Payment of penalties for late payments.

(ii) Security deposits which shall not exceed one month's rent or such reasonable fixed amount as may be required by the PHA. Provision may be made for gradual accumulation of the security deposit by the tenant. Subject to applicable laws, interest earned on security deposits may be refunded to the tenant on vacation of the premises or used for tenant services or activities.

(4) The lease shall provide that charges assessed under paragraph (b)(2) of this section shall not become due and collectible before the first day of the second month following the month in which the charge is incurred.



(c) *Rent redeterminations.* The lease shall provide for redetermination of rentals which shall include:

(1) The frequency of regular rental redetermination and the basis for interim redetermination;

(2) An agreement by the tenant to furnish such information and certifications regarding family composition and income as may be necessary for the PHA to make determinations with respect to rent, eligibility, and the appropriateness of dwelling size;

(3) An agreement by the tenant to transfer to an appropriate size dwelling unit based on family composition, upon appropriate notice by the PHA that such a dwelling unit is available.

(d) *Tenant's right to use and occupy.* The lease shall provide that the tenant shall have the right to exclusive use and occupancy of the leased premises which shall include reasonable accommodation of the tenant's guests or visitors and, with the consent of the PHA, may include care of foster children and live-in care of a member of the tenant's family.

(e) *The PHA's obligations:* The lease shall set forth the PHA's obligations under the lease which shall include the following:

(1) To maintain the premises and the project in decent, safe and sanitary condition;

(2) To comply with requirements of applicable building codes, housing codes, and HUD regulations materially affecting health and safety;

(3) To make necessary repairs to the premises;

(4) To keep project buildings, facilities and common areas, not otherwise assigned to the tenant for maintenance and upkeep, in a clean and safe condition;

(5) To maintain in good and safe working order and condition electrical, plumbing, sanitary, heating, ventilating, and other facilities and appliances, including elevators, supplied or required to be supplied by the PHA;

(6) To provide and maintain appropriate receptacles and facilities (except containers for the exclusive use of an individual tenant family) for the deposit of ashes, garbage, rubbish and other waste removed from the premises by the tenant in accordance with paragraph (f)(7) of this section; and

(7) To supply running water and reasonable amounts of hot water and reasonable amounts of heat at appropriate times of the year (according to local custom and usage) except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or where heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct utility connection.

(f) *Tenant's obligations.* The lease shall provide that the tenant shall be obligated:

(1) Not to assign the lease or to sublease the premises;

(2) Not to provide accommodations for boarders or lodgers;

(3) To use the premises solely as a private dwelling for the tenant and the tenant's household as identified in



the lease, and not to use or permit its use for any other purpose;

(4) To abide by necessary and reasonable regulations promulgated by the PHA for the benefit and well-being of the housing project and the tenants which shall be posted in the project office and incorporated by reference in the lease;

(5) To comply with all obligations imposed upon tenants by applicable provisions of building and housing codes materially affecting health and safety;

(6) To keep the premises and such other areas as may be assigned to him for his exclusive use in a clean and safe condition;

(7) To dispose of all ashes, garbage, rubbish, and other waste from the premises in a sanitary and safe manner;

(8) To use only in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air-conditioning and other facilities and appurtenances including elevators;

(9) To refrain from, and to cause his household and guests to refrain from destroying, defacing, damaging, or removing any part of the premises or project;

(10) To pay reasonable charges (other than for wear and tear) for the repair of damages to the premises, project buildings, facilities or common areas caused by the tenant, his household or guests;

(11) To conduct himself and cause other persons who are on the premises with his consent to conduct themselves

in a manner which will not disturb his neighbors' peaceful enjoyment of their accommodations and will be conducive to maintaining the project in a decent, safe and sanitary condition;

(12) To refrain from illegal or other activity which impairs the physical or social environment of the project.

(g) *Tenant maintenance.* The lease may provide that tenants shall perform seasonal maintenance or other maintenance tasks, as specified in the lease, where performance of such tasks by tenants of dwelling units of a similar design and construction is customary: *Provided,* That such provision is included in the lease in good faith and not for the purpose of evading the obligations of the PHA: *And provided further,* That the PHA shall exempt those tenants who are unable to perform such tasks because of age or physical disability.

(h) *Defects hazardous to life, health, or safety.* The lease shall set forth the rights and obligations of the tenant and the PHA in the event that the premises are damaged to the extent that conditions are created which are hazardous to life, health, or safety of the occupants and shall provide that:

(1) The tenant shall immediately notify project management of the damage;

(2) The PHA shall be responsible for repair of the unit within a reasonable time: *Provided,* That if the damage was caused by the tenant, tenant's household or guests, the reasonable cost of the repairs shall be charged to the tenant;



(3) The PHA shall offer standard alternative accommodations, if available, in circumstances where necessary repairs cannot be made within a reasonable time; and

(4) Provisions shall be made for abatement of rent in proportion to the seriousness of the damage and loss in value as a dwelling in the event repairs are not made in accordance with paragraph (h)(2) of this section or alternative accommodations not provided in accordance with paragraph (h)(3) of this section, except that no abatement of rent shall occur if the tenant rejects the alternative accommodation or if the damage was caused by the tenant, tenant's household or guests.

(i) *Pre-occupancy and pre-termination inspections.* The lease shall provide that the PHA and the tenant or his representative shall be obligated to inspect the premises prior to commencement of occupancy by the tenant. The PHA will furnish the tenant with a written statement of the condition of the premises, the dwelling unit, and the equipment provided with the unit. The statement shall be signed by the PHA and the tenant, and a copy of the statement shall be retained by the PHA in the tenant's folder. The PHA shall be further obligated to inspect the unit at the time the tenant vacates the unit and to furnish the tenant a statement of any charges to be made in accordance with paragraph (b) of this section. Provision shall be made for the tenant's participation in the latter inspection, unless the tenant vacates without notice to the PHA.

(j) *Entry of premises during tenancy.* The lease shall set forth the circumstances under which the PHA may enter the premises during the tenant's possession thereof, which shall include that:

(1) The PHA shall, upon reasonable advance notification to the tenant, be permitted to enter the dwelling unit during reasonable hours for the purpose of performing routine inspections and maintenance, for making improvements or repairs, or to show the premises for re-leasing. A written statement specifying the purpose of the PHA entry delivered to the premises at least two days before such entry shall be considered reasonable advance notification;

(2) The PHA may enter the premises at any time without advance notification when there is reasonable cause to believe that an emergency exists; and

(3) In the event that the tenant and all adult members of his household are absent from the premises at the time of entry, the PHA shall leave on the premises a written statement specifying the date, time and purpose of entry prior to leaving the premises.

(k) *Notice procedures.* The lease shall provide procedures to be followed by the PHA and tenants in giving notice one to the other which shall require that:

(1) Except as provided in paragraph (j) of this section notice to the tenant shall be in writing and delivered to the tenant or to an adult member of the tenant's household residing in the dwelling or sent by prepaid first-class mail properly addressed to the tenant; and

(2) Notice to the PHA shall be in writing, delivered to the project office or the PHA central office or sent by prepaid first-class mail, properly addressed.

(l) *Termination of the lease.* The lease shall set forth the procedures to be followed by the PHA and by the tenant in terminating the lease which shall provide:



(1) That the PHA shall not terminate or refuse to renew the lease other than for serious or repeated violation of material terms of the lease such as failure to make payments due under the lease or to fulfill the tenant obligations set forth in § 966.4(f) or for other good cause.

(2) That the PHA shall give written notice of termination of the lease of:

(i) 14 days in the case of failure to pay rent;

(ii) A reasonable time commensurate with the exigencies of the situation in the case of creation or maintenance of a threat to the health or safety of other tenants or PHA employees; and

(iii) 30 days in all other cases.

(3) That the notice of termination to the tenant shall state reasons for the termination, shall inform the tenant of his right to make such reply as he may wish and of his right to request a hearing in accordance with the PHA's grievance procedure.

(m) *Grievance procedures.* The lease shall provide that all disputes concerning the obligations of the tenant or the PHA shall be resolved in accordance with the PHA grievance procedures which shall comply with Subpart B of this part.

(n) *Provision for modifications.* The lease shall provide that modification of the lease must be accomplished by a written rider to the lease executed by both parties, except for paragraph (e) of this section and § 966.5.

(o) *Signature clause.* The lease shall provide a signature clause attesting that the lease has been executed by the parties.